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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481

Adversary Case No. 06-01902

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In the Matter of:

DELPHI CORPORATION,

Debtor.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

August 5, 2008

10:08 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

1  
2 HEARING re Doc #9535; Claims Objection Regarding Claim of State  
3 of Michigan, Department of Treasury - SBT Taxes as Objected to  
4 on Debtors' Twenty-First Omnibus Objection.

5  
6 HEARING re Doc #10445; Response to Motion for Omnibus Objection  
7 to Claims Debtor's Twenty-First Omnibus Filed by State of  
8 Michigan Department of Treasury.

9  
10 HEARING re Doc #10713; Debtors' Omnibus Reply in Support of  
11 Twenty-first Omnibus Objection.

12  
13 HEARING re Doc #11296; State of Michigan Department of  
14 Treasury's Supplemental Response to Debtors' Statement of  
15 Disputed Issues With Respect to Proofs of Claim Numbers 6354,  
16 6383, 9272 and 16633.

17  
18 HEARING re Doc #11551; Debtors' Supplemental Reply with Respect  
19 to Proofs of Claim Numbers 6354, 6383, 9272 and 16633.

20  
21 HEARING re Doc #13724; State of Michigan Department of  
22 Treasury's Supplemental Response to Debtors' Statement of  
23 Disputed Issues with Respect to Proof of Claim Number 16633,  
24 with respect to Michigan Single Business Taxes for the Period  
25 of January 1, 2005 through October 7, 2005.

1  
2 HEARING re Doc #13842; Debtors' Supplemental Reply with Respect  
3 to Proof of claim Number 16633 with Respect to Michigan Single  
4 Business Taxes for the Period of January 1, 2005 through  
5 October 7, 2005.

6  
7 06-01902 Adversary Proceeding - Delphi Corporation v. NYCH LLC

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9 HEARING re Discovery Conference.

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25 Transcribed by: Pnina Eilberg

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Good morning, Delphi  
3 Corporation.

4 MR. RAMLO: Good morning, Your Honor. Kurt Ramlo,  
5 Skadden, Arps, Slate, Meagher & Flom on behalf of the debtors.

6 Your Honor, we're here on the twenty-fifth claims  
7 hearing in the Delphi matter and the first item we'd like to  
8 cover which, although it's not on your agenda, is to indicate  
9 to the Court that we will be handing up ten stipulations  
10 resolving twelve proofs of claims that were noticed up through  
11 the notice of presentment procedure.

12 THE COURT: That's fine.

13 MR. RAMLO: Your Honor, I also understand that it's  
14 the debtors' practice to occasionally update the Court on the  
15 status of the claims reconciliation process. And I have  
16 available today a chart that gives you the status of sub class  
17 of the claims, tax claims in particular.

18 THE COURT: Okay.

19 MR. RAMLO: If I may approach and submit this?

20 THE COURT: That's fine.

21 MR. RAMLO: With me today, Your Honor, is Dean Unrue,  
22 Delphi's claims administrator, and as you can see from the  
23 chart, there were approximately -- or there were 532 tax claims  
24 filed in an amount above 593 million. And based on the  
25 activity to date, that number has been reduced to approximately

1 22.7 million of allowed tax claims, and that includes a  
2 combination of secured, priority and general unsecured claims.

3 THE COURT: I got a little confused by the open and  
4 adjourned items since the Michigan one is over a million it  
5 doesn't seem to fit these two numbers. Was the adjourned --  
6 did that include the Michigan one?

7 MR. RAMLO: I believe the adjourned does include the  
8 Michigan one, Your Honor.

9 THE COURT: Okay.

10 MR. RAMLO: And the open claims are claims that are  
11 still being reconciled.

12 THE COURT: Okay. Thank you.

13 MR. RAMLO: All right. And, Your Honor, we now turn  
14 to the contested matter that's scheduled for today with respect  
15 to Michigan Single Business Tax.

16 Again, Kurt Ramlo, Skadden, Arps, Slate, Meagher &  
17 Flom, on behalf of the debtors. With me today, Your Honor, is  
18 Mr. Jim Whitson who is the chief tax officer of Delphi who has  
19 submitted two declarations in support of the debtors' objection  
20 to this claim under the Michigan Single Business Tax. Also  
21 with us is Ms. Denise Albrecht, who's the director of state and  
22 local income taxes for Delphi.

23 Your Honor, the parties, Michigan and the debtors,  
24 have prepared a joint exhibit binder which I understand is with  
25 Your Honor. There are nine exhibits. The first exhibit is a

1 copy of the proof of claim asserting this SBT claim, and that's  
2 in a separate confidential binder, Your Honor, with a salmon  
3 tab. The next two exhibits are the declarations of Mr.  
4 Whitson, and then the remaining six exhibits are documents that  
5 relate to the SBT tax and the federal tax returns.

6 We've conferred with Michigan about the exhibits, and  
7 the parties agree that these exhibits are admissible. Michigan  
8 has indicated that it will not be cross-examining Mr. Whitson  
9 and so there'll be no live testimony with respect to this  
10 contested matter. And based on that, the debtors move to have  
11 these exhibits moved into evidence.

12 THE COURT: Okay. That's correct, ma'am?

13 MS. HOUSNER: Yes, Your Honor. Peg Housner from the  
14 Michigan Department of Treasury, or from the Michigan Attorney  
15 General's office on behalf of the Michigan Department of  
16 Treasury. And yes, I agree with Mr. Ramlo's summation.

17 THE COURT: Then I'll admit these exhibits into  
18 evidence.

19 (Proof of Claim Asserting SBT Claim, Debtors' Exhibit 1, was  
20 hereby admitted into evidence, as of this date.)

21 (Declarations of Mr. Whitson, Debtors' Exhibits 2 and 3 were  
22 hereby admitted into evidence, as of this date.)

23 (Documents Relating to SBT Tax and Federal Returns, Debtors'  
24 Exhibits 4-9, were hereby admitted into evidence, as of this  
25 date.)



1 MR. RAMLO: Thank you, Your Honor. Your Honor, the  
2 parties have also conferred about one of the figures that  
3 appears in the parties briefs with respect to the amount of the  
4 proof of the claim if Michigan were to prevail on the first  
5 issue, the issue of whether the debtors can account for R&E  
6 expenses in a different manner under federal returns as opposed  
7 to their state returns.

8 And in the debtors' papers we had indicated that if  
9 Michigan prevailed that that number would be about 946,000.  
10 Upon further consultation with the State of Michigan, the  
11 parties have now agreed, and have stipulated, that that amount  
12 would be 916,157 dollars. And I believe Michigan will openly  
13 stipulate to that.

14 MS. HOUSNER: Yes, Your Honor, we also agree.

15 THE COURT: Okay.

16 MR. RAMLO: Your Honor, Michigan's proof of claim  
17 rises under the Michigan Single Business Tax. It arises from  
18 Michigan's contention that the debtors, under the SBT, are not  
19 permitted to account for their research and experimental  
20 expenses that are either capitalized and amortized on their  
21 federal return or can be deducted in full; that whatever  
22 election the debtors make with respect to those expenses the  
23 debtors must make the same election on their SBT return.

24 The SBT statute, however, very plainly says that the  
25 debtors must calculate their tax base under the SBT by

1 reference to business income which is defined as federal  
2 taxable income as defined in Section 63 of the Internal Revenue  
3 Code. And that is precisely what the debtors did.

4 THE COURT: Is there any dispute that if the debtors  
5 had taken the full deduction on their federal return that that  
6 would count as income under the Michigan statute?

7 MR. RAMLO: Yes.

8 THE COURT: Is the issue truly just consistency of  
9 the federal return and the same position for the Michigan SBT?

10 MR. RAMLO: With respect to the first issue, yes,  
11 Your Honor.

12 THE COURT: Okay.

13 MR. RAMLO: And Michigan basically raises two  
14 challenges with respect to that. One is that they take the  
15 position that a portion of the statute that requires a taxpayer  
16 to submit a copy of their federal return when read in  
17 conjunction with the definition of business income requires --  
18 indicates that the statute requires the taxpayer to take the  
19 number that appears on the federal return and transpose that  
20 number over to the SBT return.

21 Another argument proffered by Michigan is that the  
22 instructions that accompany the SBT return indicate that you  
23 take the number off a certain line item on your federal return  
24 and input that number on your SBT return. Again, as the  
25 statute would indicate, the statute does not state that you

1 just take a number from your federal return and transpose it  
2 over. What it says is that your federal taxable income is as  
3 defined in the Internal Revenue Code, not as found in your  
4 federal return or not as calculated on your federal return  
5 submitted to the IRS.

6 The notion that a taxpayer can calculate their  
7 federal taxable income for state purposes differently than for  
8 federal purposes is supported by other parts of the statute.  
9 The first is that when calculating federal taxable income the  
10 debtors -- the taxpayer can choose to either use the 1999  
11 version of the Internal Revenue Code or use the current tax  
12 year of the Internal Revenue Code with respect to the tax  
13 period at issue.

14 Another aspect of the statute is that with respect to  
15 accounting for compensation, the State of Michigan wanted to  
16 indicate that you must follow the same method that you use on  
17 the federal level; Michigan knew how to do that. With respect  
18 to compensation, the statute makes clear that if the debtor  
19 uses a cash or accrual basis of accounting for compensation,  
20 they must use the same method on the state return.

21 Another aspect of why just merely transposing over a  
22 number from the federal return to the state return is not  
23 workable, Your Honor, is as you have here, there is a different  
24 set of taxpayers that are on the federal return that are on the  
25 SBT return here. Here only four of the debtors that appear on

1 the SBT return and to just merely transpose that number over  
2 doesn't work. There has to be some kind of reconciliation  
3 between those two numbers.

4 I'm kind of weaving back a little bit, Your Honor.  
5 As I've indicated, Michigan says that the instructions that  
6 come with the SBT return require the taxpayer to just insert  
7 this number. It's important to note that under Michigan law,  
8 the SBT instructions are not promulgated under its  
9 Administrative Procedures Act, does not have the force of law,  
10 at most provides guidance and it cannot impose any requirement  
11 not found in the SBT statute. And as we indicated, there's  
12 nothing in the statute that requires the transposition of the  
13 number from the federal return.

14 The requirement that a taxpayer supply a copy of the  
15 federal return or if there's an amendment or an adjustment,  
16 modification of the federal return requires the taxpayer to  
17 file an amended SBT return, is wholly consistent with the  
18 method that the debtors have taken here. Michigan suggests  
19 that the requirement for submitting that return indicates that  
20 the taxpayer must follow that federal return. But the  
21 supplying of that federal return has utility and meaning in  
22 this context. The IRS is going to audit the federal return;  
23 they will make adjustments based on whether certain activity on  
24 that return is permissible under the Internal Revenue Code.  
25 That, in turn, would affect the calculations of the pro forma

1 federal taxable income that the debtors have made on their SBT  
2 return. For example, if the debtors had affiliated (ph.) of  
3 what they consider R&E expenses on their federal return but  
4 after audit the IRS determined that only 900 million of those  
5 expenses were, in fact, falling under the category of R&E, that  
6 would obviously affect the SBT return when the debtors go to do  
7 their pro forma calculation of what their expense is. On the  
8 federal return, after audit, you would have to capitalize and  
9 amortize 900 million. On the SBT return, your full deduction  
10 in the year incurred would be similarly limited to 900 million.  
11 So the providing of the return does not indicate that you  
12 cannot do a pro forma calculation of federal taxable income for  
13 SBT purposes.

14 As I indicated earlier, Your Honor, if Michigan were  
15 to prevail on this theory, the parties have stipulated that the  
16 amount is 916,157 dollars.

17 I'd like to turn to Michigan's second argument. The  
18 SBT was repealed effective as of the end of 2007. When the  
19 debtors calculated their federal taxable income for state  
20 purposes, rather than prepare pro forma federal tax returns  
21 from scratch, they took their federal return, as filed with the  
22 IRS, and they did a one-sheet reconciliation to take that  
23 number over to the number that would result if they fully  
24 deducted R&E expenses in the year incurred. But rather than  
25 fill out a whole new set of returns, they did this one page

1 reconciliation. That reconciliation involved terminology on  
2 the form called addbacks. The first line of that form was to  
3 reverse the capitalization and amortization on the federal  
4 return, it's on this one-page reconciliation, turn that into a  
5 deduction. But because there was also a one-tenth amortization  
6 of that amount for the same year on the federal return, you  
7 needed to add that back for your pro forma calculation. There  
8 was a tail off of amortization from R&E expenses taken in prior  
9 years, 1999, 2000-2004. One-tenth of those amounts also  
10 appeared on the 2005 federal return as filed. The  
11 reconciliation sheet added back those amounts so that you came  
12 to an accurate calculation of federal taxable income as if  
13 there was a return from scratch that fully deducted R&E  
14 expenses in the year incurred.

15 Michigan views those addbacks, which were made on the  
16 2002-2004 returns and on the return at issue here, the 2005  
17 return, as somehow making Michigan whole or somehow a recapture  
18 of some tax benefit that has to be given back. But when seen  
19 in the light of the purpose of those addbacks, they're just  
20 really computational shortcuts, a way to do on one page what  
21 would otherwise require preparation of whole new pro forma  
22 returns.

23 Taking those addbacks and viewing them as somehow of  
24 a make-whole mechanism, Michigan then points to the termination  
25 of the SBA in 2007 and the fact that there's nothing under the

1 new tax scheme, called the Michigan Business Tax, as implicitly  
2 requiring that those addbacks all be exhausted by the end of  
3 2007. So, for instance, 2007 would normally be amortized over  
4 ten years, but if you had to add those back before 2007, you'd  
5 have to do that in six years. So Michigan's position, with  
6 respect to the number that's in the briefs, I forget the pro  
7 rata number for pre-petition but for 2005 their assertion of  
8 what the liability would be on this theory is 1.44 million.

9 The 2002 addbacks would be taken over six years. So  
10 they would require one sixth of the 2002 R&E expenses to be  
11 added back on the 2005 return, one fifth for 2003, one fourth  
12 for 2004. For 2005, one third. And based on this accelerated  
13 addback theory, Michigan comes up with the 1.44 million number.  
14 But by doing the addbacks in this manner, ironically you come  
15 up with a calculation that does not fit under any version of  
16 the Internal Revenue Code, not the '99 version permitted by the  
17 SBT and not any other version of the Internal Revenue Code.  
18 There's no statutory basis in the SBT or the Internal Revenue  
19 Code that would require this calculation.

20 To that extent, it's inconsistent with Michigan's  
21 first issue that you must account for R&E expenses in the same  
22 way on both returns; either way complies with the Internal  
23 Revenue Code. The accelerated addback theory has no basis and  
24 actually conflicts with the Internal Revenue Code.

25 Now, the repeal of the SBT really should be of no

1 moment because the nature of the SBT tax is fundamentally  
2 different than the Michigan Business Tax. The Single Business  
3 Tax is a value added tax that takes into account labor, capital  
4 and other items. The Michigan Business Tax is a combination of  
5 two types of tax, one based on gross receipts and the other  
6 based on income.

7           Given those fundamentally different natures of the  
8 taxes and given the examples of other statutory transition  
9 rules, indicating that certain items that were not fully  
10 exhausted or taken care of under the SBT have some utility  
11 under the MBT or some limited utility, through percentages or  
12 otherwise or certain time limits, there's nothing in the MBT  
13 that requires or permits the addbacks or the amortization to  
14 occur under the MBT. Michigan is concerned that the addbacks  
15 that have been done -- and this is again, this is assuming the  
16 addbacks have some independent tax significance, which they do  
17 not, they were computational shortcuts. But assuming they did,  
18 there's nothing in the SBT or the MBT that indicates that  
19 because those were not exhausted at the end of 2007 that they  
20 must be accounted for before the end of 2007 or that they must  
21 be accounted for under the MBT.

22           And Michigan knows how to do that kind of thing if it  
23 wants to. Under the SBT there was a provision that permitted  
24 taxpayers to fully deduct, in the year incurred, certain  
25 tangible asset cuts rather than depreciating them over time.



1 When you did that, however, on subsequent returns you had to  
2 make adjustments that in essence made additions to your tax  
3 base in order to account for, in essence, permitting the early  
4 deduction of those amounts.

5 The MBT doesn't have any kind of scheme like that.  
6 There's just no statutory basis and no really logical basis to  
7 require these addbacks to be exhausted before the end of 2007.

8 And, Your Honor, based on that we ask that the Court  
9 find that the way the debtors have calculated their returns and  
10 submitted their returns is permissible under the Single  
11 Business Tax and that Michigan's theory for accelerated  
12 addbacks lacks merit and that the claim be disallowed.

13 THE COURT: Okay. Just a couple of questions on the  
14 addback issue. You say that in the past Delphi would add back  
15 the pro rata share of the depreciation and you say that was  
16 just for convenience sake?

17 MR. RAMLO: For computational convenience, Your  
18 Honor.

19 THE COURT: Am I wrong, there was a cost to doing  
20 that that was not minimal, right, to Delphi?

21 MR. RAMLO: Your Honor, when you did the addbacks the  
22 end result of going from a federal taxable income, as filed  
23 with the IRS, you do these adjustments, that end number is the  
24 same exact number that you would get if you just did not do  
25 those reconciliations, you just prepared a new set of tax

1 forms.

2 THE COURT: Because you depreciated one-tenth of the  
3 year?

4 MR. RAMLO: On the federal return.

5 THE COURT: On the federal return, okay. Because  
6 that reflected that you did that one-tenth payment?

7 MR. RAMLO: Yes.

8 THE COURT: You paid on one-tenth?

9 MR. RAMLO: Yes, you amortize one-tenth per year.

10 THE COURT: I understand. My second question is, I  
11 didn't see it in the record, but I'm going to ask both of you  
12 if I missed something. Is there anything in the record that  
13 deals with the -- whether the position that Michigan is taking  
14 here with regard to the SBT having to be based on the federal  
15 return, whether that position is one that has been consistently  
16 taken by the State of Michigan, not just with Delphi but always  
17 with other taxpayers? Is there anything in the record on that  
18 point?

19 MR. RAMLO: There is something in the record, Your  
20 Honor. Mr. Whitson's first declaration indicates that a  
21 predecessor-in-interest to one of the debtors had done the  
22 calculations in this same manner and that those calculations  
23 survived audit on more than one occasion.

24 THE COURT: Meaning in the same manner, i.e., the  
25 federal return was different than the basis for federal income

1 on the state SBT?

2 MR. RAMLO: That's correct, Your Honor.

3 THE COURT: Okay. All right.

4 MR. RAMLO: I think it's fair to note, Your Honor,  
5 that the debtors explored and briefed, in their first set of  
6 papers, the issue of equal protection based on the results of  
7 discovery and perhaps a bit of compromise; the debtors are not  
8 pursuing that argument today.

9 THE COURT: Let me just -- oh, I see, paragraph 9.  
10 Okay. I see it.

11 MR. RAMLO: Your Honor, if I may return briefly to  
12 your prior question about the one-tenth amortization? On page  
13 11 of the most recent supplemental reply and in Mr. Whitson's  
14 second declaration, paragraph 11, we provided three charts that  
15 attempted to illustrate, a little more visually, what the  
16 purpose of that reconciliation sheet was. And the first chart  
17 shows how the R&E expenses were capitalized on the federal  
18 return, and then one-tenth of those amounts were amortized in  
19 each of those years. And that would be the first chart in  
20 paragraph 24.

21 The second chart seeks to illustrate, more visually,  
22 the function of the schedule that was attached to the SBT  
23 return. It shows that the amortizations in the top third are  
24 what, in essence, inherent and subsumed within the federal  
25 return. Then the next line shows the reversal of the

1 capitalization and amortization so it becomes a deduction in  
2 full. But because of the inherent deductions on the federal  
3 taxable income on the federal return we needed to have  
4 reversing entries so, in essence, that we were not deducting  
5 more than our expenses. Without the second set of addbacks, if  
6 we had a billing of R&E expenses we would be, actually,  
7 deducting on our SBT return more than a billion in R&E  
8 expenses. But these cancelling entries, the entries on the  
9 bottom third cancel the entries on the top third so that all  
10 that you're left with is the middle line of a deduction in full  
11 of R&E expenses in the year incurred.

12 The third chart seeks to illustrate how it would  
13 appear, a part of the return, if you had prepared pro forma  
14 federal returns from scratch to demonstrate federal taxable  
15 income for SBT purposes.

16 Thank you, Your Honor.

17 THE COURT: Okay.

18 MS. HOUSNER: Good morning, Your Honor.

19 THE COURT: Good morning.

20 MS. HOUSNER: Peg Housner from the Michigan Attorney  
21 General's office on behalf of the Michigan Department of  
22 Treasury. I know that you've had your peek at the Michigan  
23 Single Business Tax, I'm going to try to at least give you some  
24 explanation as to, obviously, our position on this and some of  
25 the historical information on the Michigan Single Business Tax

1 as it relates to Delphi and some of the other automotive  
2 suppliers in the State of Michigan. But I think that the first  
3 issue that the Court needs to look at is number one, this is a  
4 Michigan tax. It was enacted by the Michigan legislature.  
5 It's been enforced and -- to the rules, policies and procedures  
6 of the Michigan Department of Treasury as enacted by the  
7 legislature.

8 The treatment that Delphi is asking you to take today  
9 is in contradiction to the historical analysis and historical  
10 procedures and policies that the Michigan Department of  
11 Treasury has established in regards to this tax.

12 Delphi is asking this Court to reinterpret our  
13 statute in a manner that is contrary to the practices and the  
14 policies that have been established by the Michigan Department  
15 of Treasury.

16 Michigan has historically and consistently demanded  
17 that all taxpayers filing a Michigan Single Business Tax use  
18 the same federal taxable income as their Michigan business  
19 income for that same reported tax year. Mr. Ramlo has made  
20 references this morning that there may have been something in  
21 the past wherein someone else was allowed to take this  
22 specialized treatment or provide one federal tax return that  
23 calculated the R&E expense one way, filing another Michigan tax  
24 return with the R&E expense being handled another way, either  
25 the full deduction or the amortization. But historically

1 Michigan has not allowed that.

2 THE COURT: What's in the record beyond the form, the  
3 tax form, that has the instruction on it to support that  
4 proposition?

5 MS. HOUSNER: Well, Your Honor, Michigan Department  
6 of Treasury has established many revenue administrative  
7 bulletins and procedures, but for argument's sake, Your Honor,  
8 I can try to give you some other examples. I understand that  
9 the argument's being made by us that because a tax return  
10 requires that, that we're looking that information coming from  
11 the tax return right into the -- from the federal tax return  
12 into the Michigan Single Business Tax return. But, Your Honor,  
13 when you read that in relationship to the statute and the  
14 history of the statute and the policies that Michigan has  
15 enacted, that is not a correct interpretation of our statute.

16 Your Honor, to continue with my presentation to the  
17 Court today, Delphi is now asserting that the treatment that it  
18 receives from the Michigan Department of Treasury is not  
19 authorized by statute. That the treatment is not fair or equal  
20 in relationship to other taxpayers. This is a business that  
21 has benefitted, in the past, from many of the practices and  
22 policies of the Michigan Department of Treasury in the state.  
23 And it's a state that has extended itself to this business in  
24 many ways to assist the financial viability of the automotive  
25 industry in Michigan.

1 In these trying economic times Michigan has tried to  
2 be innovative and tried to facilitate the needs of some of the  
3 taxpayers there. But Michigan has an obligation to all its  
4 taxpayers that it must continue to equally enforce all its laws  
5 and regulations in a consistent and legal manner. It appears  
6 very disingenuous now for Delphi to complain that it's not  
7 being properly and fairly treated under the law.

8 Specifically, the Court is being asked to interpret  
9 the provisions of the Internal Revenue Code, as described by  
10 Mr. Ramlo, specifically Section 63, Sections 174, which is the  
11 R&E expense, and 59(e) which gave the taxpayer some options as  
12 to amortizing or taking a full deduction of their expenses.

13 We're taking those in conjunction with the Michigan  
14 Single Business Tax and its definitional provisions, as also  
15 discussed by Mr. Ramlo earlier, in that -- the relationship  
16 between the Internal Revenue Code, and its requirements, and  
17 the Michigan Single Business Tax Code. This Court is being  
18 asked to reinterpret that relationship.

19 Delphi argues that the state's interpretation of the  
20 statute is wrong; it's not supported by past policy and  
21 practice. Delphi says that our longstanding requirement that  
22 federal taxable income is filed and reported and Michigan  
23 business income must be the same is not supportable. But in  
24 that Delphi will assert that the interpretation of Michigan  
25 compiles laws allows them to pick and choose the provisions of

1 the Internal Revenue Code that they choose when they complete  
2 their federal tax return, which provisions of the Internal  
3 Revenue Code they use when they -- that they're using two  
4 different, separate types of computations. When they're filing  
5 their federal income tax return they're calculating their  
6 expenses in one way. When they reformulate and file in  
7 Michigan they're using another standard which, again, Michigan  
8 states is not the correct way to calculate that.

9 THE COURT: Let me make sure I understand that. If,  
10 in fact, Delphi had reported on its federal tax form the full  
11 deduction for R&E that it's using as the basis for the income  
12 on the SBT form, if there was parallelism in both forms, then  
13 Michigan wouldn't have a problem with that?

14 MS. HOUSNER: No, the income as reported in the  
15 federal return would fall through to the Michigan Single  
16 Business Tax return.

17 THE COURT: Okay.

18 MS. HOUSNER: But what happens, Your Honor, with that  
19 situation when Delphi does not do that, as was somewhat  
20 explained by Mr. Ramlo, is that you have a federal tax return  
21 wherein they've taken this full deduction -- I mean, they've  
22 amortized their R&E expenses over the next ten years. And on  
23 the Michigan return they have fully deducted that expense. In  
24 that way -- number one, we have a contradiction. And our  
25 position in Michigan is that that's not an allowable



1 contradiction. That the state has not allowed other taxpayers  
2 to file the same return or for the same tax year -- I'm sorry,  
3 different reported incomes. We have consistently not allowed  
4 that.

5 I know that part of the argument that Delphi makes  
6 goes back to the Michigan statute about the allowance of  
7 whether they want to file pursuant to the Internal Revenue Code  
8 in effect at 1999 or the present year. Our position with that  
9 is, is that Delphi, when they choose or when they say that  
10 they're choosing to file their tax return specific to one year  
11 or the other, in essence what they're really doing is trying to  
12 cherry-pick those provisions of the Internal Revenue Code that  
13 fit them at that particular circumstance. Michigan's policy  
14 has been that the returns need to be consistent. And when we  
15 get away from that -- I mean, Michigan's Single Business Tax  
16 statute and the Internal Revenue Code are very much entwined.  
17 When we start to deviate from that, we end up with situations  
18 wherein we have a problem.

19 THE COURT: Does the Michigan form say use the number  
20 from this year's federal form or does it say use the number  
21 from this year's federal form or what you could have deducted  
22 under the 1999 version of the code?

23 MS. HOUSNER: It doesn't say that, Your Honor.

24 THE COURT: It doesn't say the latter?

25 MS. HOUSNER: Right.

1 THE COURT: Okay.

2 MS. HOUSNER: This whole section of our code, the  
3 Michigan -- compiled law Section 208.5 which is this whole  
4 definitional section that the state relies on, or that Delphi's  
5 relying on, to validate their computation of two different  
6 amounts, this part of the -- our position is this part of the  
7 statute was enacted to protect the Michigan statute from  
8 changes and updates in the Internal Revenue Code.

9 Since the Michigan Single Business Tax reportable  
10 business income is based on federal taxable income, the Single  
11 Business Tax Code needed to have the ability to be somewhat  
12 flexible to allow the adjustment to the Internal Revenue Code  
13 changes to be effective within Michigan. So we created --  
14 otherwise the state would be constantly being forced to amend  
15 that part of the code. So Michigan is consistent with the  
16 legislation set in baseline business income in attempting to  
17 keep the Michigan Single Business Tax Act reasonably current  
18 with federal tax developments. Hence, those provisions in the  
19 code which, in this particular case, is which Delphi -- that's  
20 what they're resting their arguments on. That they have this  
21 ability to double calculate federal taxable income based on  
22 this one provision in the code. At least that's the basis of  
23 where it starts.

24 The Michigan Single Business Tax Act or the Michigan  
25 Single Business Tax under the act describes business income

1 from a corporation means federal taxable income. Federal  
2 taxable income means taxable income is defined in Section 63 of  
3 the Internal Revenue Code. The Internal Revenue Code means the  
4 United States Internal Revenue Code, in effect as of 1999 or at  
5 the option of the taxpayer. That's in the statute.

6 THE COURT: Right. I thought it was slightly  
7 different, that they could do it either as in effect on the  
8 date of the filing of the tax or as in effect of 1999.

9 MS. HOUSNER: That's correct, Your Honor. That's  
10 correct. If I misspoke, I'm sorry.

11 THE COURT: Okay.

12 MS. HOUSNER: Yes, that is correct. But our position  
13 is, is that in essence Delphi didn't really -- that's the  
14 position they're taking but our position is, is that when  
15 there's a contradiction the statute doesn't allow for that in  
16 the reported incomes. They're using it for a different  
17 purpose, and our position is that they're cherry-picking  
18 different provisions from the Internal Revenue Code to get them  
19 the best tax deal they can get in Michigan. And when we do  
20 that, due to the nature of the taxes being so intertwined, we  
21 end up with a result that we're dealing with today in this  
22 court.

23 THE COURT: What is your response to the debtor's  
24 argument that for the federal return as a consolidated return  
25 dealing with many taxpayers who aren't subject to the Michigan

1 SBT so you can't really have parallelism anyway in respect of  
2 the two returns.

3 MS. HOUSNER: That's correct, Your Honor. Our  
4 position is, is that the treatments and the code provisions  
5 that the taxpayer is using on one should be similar to the ones  
6 that they're using on the Michigan business income tax return.  
7 Even though they may have other entities and things that may  
8 come into play with the Michigan Single Business Tax; those  
9 needs to be reflected. The consistency is in the processing,  
10 in the deductions and on the returns.

11 Your Honor, I think that, like I said, under the code  
12 provisions, that Michigan has consistently tried to interpret  
13 and treat taxpayers similarly situated in a similar manner.  
14 And we have not allowed other taxpayers in the State of  
15 Michigan to do this type of calculation between their federal  
16 taxable income and their Michigan business income.

17 THE COURT: But again, as far as the record is  
18 concerned, I know the state has taken that position and I know  
19 what's on the form but other than that, is there anything else  
20 on the consistency point in the record?

21 MS. HOUSNER: Not that I'm aware of, Your Honor.

22 THE COURT: Can we turn to the accelerated addback  
23 issue?

24 MS. HOUSNER: Yes, Your Honor. In this particular  
25 case, and at issue in our claims objection, is the treatment of

1 the research and experimental expenditures. The relationship  
2 between that and the 59(e) deduction allowed under the Internal  
3 Revenue Code.

4 Michigan's position on that issue is that once we get  
5 into this situation wherein we have allowed or accepted or  
6 there had been an aberration in the policy of how we've treated  
7 that particular deduction, the State of Michigan in the past  
8 when that situation may have occurred and the taxpayer did take  
9 the amortized -- took a ten-year amortization on their R&E  
10 expenses on their federal tax return and in turn did a full  
11 deduction on the Michigan business tax return, there was this  
12 calculation, this addback of the one-tenth. And the reasoning  
13 behind that --

14 THE COURT: I'm sorry.

15 MS. HOUSNER: I'm trying to do historically, Your  
16 Honor.

17 THE COURT: So there have been times when there's  
18 been a difference, i.e., one-tenth under the federal return and  
19 the full under the Michigan?

20 MS. HOUSNER: Yes, Your Honor. At one point in time  
21 the Michigan, and I will call it a misinterpretation, a  
22 modification to the policy extremely limited but yes.  
23 Obviously, and Delphi asserts in their own statement that at  
24 one point in time that may have, in fact, happened.

25 THE COURT: Okay.

1 MS. HOUSNER: That is an aberration. And the state's  
2 position is even at that point in time if the state did  
3 something to try to accommodate a taxpayer or this aberration  
4 occurred, once the state recognized that this was not a  
5 workable solution, we had to correct that. And our position  
6 is, is that even if that were to have happened, the state's  
7 position is that once we realized that that's not a proper  
8 interpretation we make the correction to our interpretation and  
9 we go back to consistently following through in making those  
10 corrections consistently and equally with all other taxpayers;  
11 that we needed to do that.

12 The arguments that Delphi makes in regards to the  
13 amortization and its effect on Michigan's Single Business  
14 Taxes, if in fact that happened and there was a provision under  
15 the Internal Revenue Code which tells them they can do one of  
16 two choices under 5090; fully deduct, amortize. They take one  
17 treatment on the federal return, a second treatment on the  
18 Michigan return. What happens to Michigan is that there isn't  
19 a way to add that back; Michigan ends up taking a double hit.  
20 They take fully deducted every year after that, as Delphi's  
21 filing their returns for the next nine or ten years, they're  
22 basing the Michigan business income on the federal taxable  
23 income which has been reduced by -- they've taken the one-tenth  
24 deduction.

25 THE COURT: Right.

1 MS. HOUSNER: So Michigan takes another hit because  
2 now we've taken it fully on the first year, the next year when  
3 they report they've taken it again. So this theory evolved  
4 where Delphi added it back. That wasn't authorized by statute  
5 either, not a Michigan statute. Delphi's reliance is that the  
6 Internal Revenue Code allowed them to do that. But the only  
7 way to compensate or make the state whole on that issue without  
8 having to take or allow them to take the deduction twice was to  
9 do an addback.

10 Our position now on this issue is if and when this  
11 has happened, and we are at the end of the Michigan Single  
12 Business Tax, the tax has been repealed. It ended at the end  
13 of 2007. That for those taxpayers who may find themselves in a  
14 situation where they have done the double treatment, they filed  
15 one dollar amount with the federal government, they filed the  
16 second dollar amount with Michigan, based on that R&E expense  
17 where they've amortized it on one and fully deducted on the  
18 other, the State of Michigan will allow those taxpayers -- if  
19 there's not some way to accelerate that addback to have a  
20 windfall that other taxpayers are not going to be allowed.

21 THE COURT: Well, but let me make sure I understand  
22 that because, and maybe I got this wrong, but I thought that  
23 Delphi was adding back the portion that it would have  
24 previously deducted if you had a total deduction. And what  
25 it's disputing is the acceleration or the adding in of addbacks

1 for years after the repeal of the statute.

2 MS. HOUSNER: We're talking about adding the  
3 accelerated addbacks during the life of the statute, not after  
4 the statute expires, which is part of the issue.

5 THE COURT: Maybe another way to ask the question is  
6 given the repeal of the statute so that a new statute is now in  
7 effect that has its own requirements --

8 MS. HOUSNER: Right.

9 THE COURT: -- what within what Delphi is proposing  
10 to do would lead to Michigan being double deducted on the SBT  
11 tax?

12 MS. HOUSNER: There are no provisions in the new tax  
13 to do this, even the one-tenth addback.

14 THE COURT: Well, I understand, but it's a new tax.

15 MS. HOUSNER: Okay.

16 THE COURT: I fully understand the rationale of  
17 saying that you obviously have to add back the portion that you  
18 deducted under your federal tax for that year because otherwise  
19 having taken the full deduction in a prior year you really  
20 wouldn't be entitled to deduct again the one-tenth depreciation  
21 that you did in the subsequent year.

22 MS. HOUSNER: Right.

23 THE COURT: But that's assuming you're paying the SBT  
24 tax for that year. If you don't have to pay it anymore it  
25 seems to me to be apples and oranges at that point. You don't



1 do this -- as I understand it, the Michigan Business Tax  
2 doesn't have the same type of mechanism for calculating income  
3 and making a deduction.

4 MS. HOUSNER: It does not.

5 THE COURT: Another way to ask that question is,  
6 you're not asserting that this would avoid double relief for  
7 Delphi -- Delphi's mechanism that they're proposing would avoid  
8 double relief for Delphi under the Michigan Business Tax,  
9 right? Because that's apples to oranges.

10 MS. HOUSNER: Right.

11 THE COURT: So how is Delphi getting a windfall on  
12 the SBT for what it's proposing to do on the addbacks?

13 MS. HOUSNER: Your Honor, I think the first problem  
14 that we have, at least statutorily is, is that number one,  
15 there was no provision to even do the one-tenth addback. It  
16 happened; Michigan had to do something.

17 THE COURT: No, but it does make sense.

18 MS. HOUSNER: Right.

19 THE COURT: Because you can't --

20 MS. HOUSNER: They had to do something.

21 THE COURT: Right.

22 MS. HOUSNER: Once we allowed or once that return was  
23 not audited or corrected --

24 THE COURT: Right.

25 MS. HOUSNER: -- then Michigan had to do something.

1 THE COURT: Right.

2 MS. HOUSNER: To me, the theory follows through that  
3 if Delphi is not somehow made to bring that R&E expense back  
4 into the tax base, then Michigan has foregone the collection of  
5 a portion of a single business tax that statutorily it was  
6 entitled to collect.

7 THE COURT: Again, since the statute was repealed,  
8 doesn't it become a moot issue because you're not -- Delphi  
9 wouldn't be taking that extra deduction based on the next  
10 year's depreciation.

11 MS. HOUSNER: And, Your Honor, and I will plead to  
12 you that I am just slowly starting to learn the new tax  
13 structure, but my understanding is that some of the new  
14 Michigan Business Tax does have a component in it that relates  
15 to federal taxable income.

16 THE COURT: But that's not what's at issue here,  
17 though, right?

18 MS. HOUSNER: Absolutely not. None of the tax  
19 here's --

20 THE COURT: If that comes up in connection with  
21 Delphi's taxes next year in connection with those statutes then  
22 it would stand to reason that Michigan would say to Delphi you  
23 already took this deduction.

24 MS. HOUSNER: Right. I think it's twofold. Number  
25 one, the Michigan Department of Treasury cannot allow -- cannot

1       compromise a tax. They have no authority to compromise a tax,  
2       the Michigan Department of Treasury. And I think when you look  
3       at that in relationship to what happened or may have happened  
4       in the past in the one-tenth, Michigan -- when that occurred  
5       and we were able to get it back over ten years, Michigan was  
6       able to get that income back and hence the respective Single  
7       Business Tax. It became a timing issue and the state could or  
8       felt that it was not in any way compromising the amount of tax  
9       that would have been paid had we not allowed the double  
10      computation; had we not allowed Delphi to do a federal, taxable  
11      income that was different than its Michigan Single Business Tax  
12      or business income.

13               But once that happened and we had to find a way to  
14      make sure that there was no compromise of the tax. And I think  
15      Michigan is trying to take that into this next stage saying  
16      okay, yeah, we are at the end of the Michigan Single Business  
17      Tax. But if we have allowed Delphi to take that full deduction  
18      up front, single business tax, if we don't find some way to  
19      collect we have, in fact, compromised the amount of tax we  
20      should have collected. So in an effort to prevent that from  
21      happening, we have tried to accelerate the addbacks to make  
22      sure that the entire amount is recollected or has become  
23      calculated back into the Michigan Single Business Tax.

24               THE COURT: All right. I guess the problem I have  
25      with that is I don't see where it's a compromise when the

1 legislature changed the tax. I mean, you're right if it had  
2 stayed the same then the logic fits.

3 MS. HOUSNER: Right.

4 THE COURT: But I just don't see where it's a  
5 compromise at this point.

6 MS. HOUSNER: I don't know if I can explain it any  
7 better to the Court.

8 THE COURT: Okay. All right.

9 MS. HOUSNER: I think that, like I said, I think that  
10 the Michigan Single Business Tax as a value added tax and  
11 everything else that's gone with it, additions and deductions  
12 and things that go into play there, it's complex and I think  
13 that the State of Michigan has done its best effort to try to  
14 maintain some kind of equity between the taxpayers and not  
15 allowing some taxpayer to, as we see it, have this windfall  
16 from this double calculation of the tax that they have.

17 THE COURT: Okay.

18 MS. HOUSNER: Just in closing, Your Honor, I would  
19 ask that the Court deny the relief that Delphi has asked for,  
20 that they uphold the Michigan Single Business Tax claim for  
21 2005 as capped at 1.44 million. And I think that's everything.  
22 Do you have any other questions at this point?

23 THE COURT: No, I think that's it. Thank you.

24 MS. HOUSNER: Uh-huh.

25 MR. RAMLO: Your Honor, may I briefly respond?

1 THE COURT: Briefly, yes.

2 MR. RAMLO: Your Honor, assuming there were some sort  
3 of independent tax significance to the accelerated addbacks --  
4 excuse me, to the addbacks themselves, Michigan seeking to  
5 accelerate the addbacks is contrary to what they assert is the  
6 policy of the addbacks and which the Court has recognized to  
7 avoid double-dipping, or as Your Honor states it, double  
8 relief.

9 By accelerating the addbacks, Michigan is asking  
10 Delphi to do an addback in 2005 to prevent potential double-  
11 dipping in 2006, 2007 and later. Yet when Delphi filed its  
12 2006 return it did a similar schedule. When it goes to 2007 it  
13 might do a similar schedule, assuming it does another split  
14 election. Then again, it might do the same accounting on the  
15 federal return that it does on the state return.

16 THE COURT: Well, but if it does the same accounting  
17 in both then you'd think that at that point they would have to  
18 avoid the double counting; you'd have to take an addback.

19 MR. RAMLO: There would still have to be a pro forma  
20 calculation or --

21 THE COURT: Right.

22 MR. RAMLO: -- federal taxable income for SBT  
23 purposes to make sure it's consistent with prior --

24 THE COURT: Right.

25 THE COURT: -- that the handling of those expenses in

1 prior years. Absolutely, Your Honor.

2 THE COURT: Right.

3 MR. RAMLO: Yes.

4 THE COURT: So all you're fighting is the accelerated  
5 part?

6 MR. RAMLO: Yes. The accelerated -- Your Honor's  
7 recognized it to a certain extent; it's just to prevent double-  
8 dipping. But by accelerating it you destroy that purpose.  
9 You're trying to avoid double-dipping that's hypothetically in  
10 the future. And it assumes that Delphi won't make the  
11 appropriate adjustments in the future, and there's no evidence  
12 that that'll be the case.

13 Michigan briefly states that the addbacks themselves  
14 are not authorized by statute. But as we've indicated  
15 previously, addbacks don't have any independent tax  
16 significance, they're just computational shortcuts. What they  
17 did -- what the debtors did was deduct R&E expenses in full in  
18 the year incurred. How they calculated that number is  
19 irrelevant as long as that number represents the full  
20 deduction.

21 With respect to the first issue, Michigan  
22 characterizes Delphi's position as cherry-picking. And this  
23 isn't cherry-picking, Your Honor. The debtors are taking  
24 advantage of an election granted them under the federal  
25 Internal Revenue Code and a method that is granted to them

1 under the SBT. And in the facts of this particular case, it's  
2 definitely not cherry-picking. Defendants allow these foreign  
3 tax credits to be used in certain circumstances, and that's  
4 what's been driving the elections that have been made in 2002-  
5 2005. And the debtors had a valid business justification for  
6 organizing their affairs in the way they did on their federal  
7 return. And they're entitled to account for those expenses in  
8 the method that they have done under the SBT. They're  
9 following the statute. There's no cherry-picking.

10 Finally, Your Honor, Michigan has indicated that this  
11 is their policy, no split election. But the only place that  
12 policy appears, other than perhaps in the instructions to the  
13 SBT, is in the briefs before your Court. And as with the  
14 instruction and the briefs before your Court they don't have  
15 the force of law, they're not promulgated under the Michigan  
16 APA; they cannot impose a requirement not found in the APA.  
17 And there is a proposition of tax law that says when the  
18 government first asserts its policy in a brief during  
19 litigation, courts do not give much credence to that policy.  
20 It's a little bit too self-serving. That's certainly a  
21 doctrine under federal tax law and Michigan law actually  
22 incorporates, to a great extent, federal tax precedent into its  
23 law. We didn't reference that in the brief, Your Honor, but  
24 there's an unpublished decision called Eden v. Michigan  
25 Department of Treasury; it's docket number 174092. It's a

1 Michigan tax break deal that holds that the Michigan SBT  
2 incorporates federal precedent with respect to tax  
3 propositions.

4 So I'd ask the Court to appropriately value the  
5 policy of Michigan by when it was brought up and when it was  
6 published. It was published in briefs before your Court when  
7 this issue was in the middle of litigation.

8 Thank you, Your Honor.

9 THE COURT: Okay. I have before me the remaining  
10 contested portion of the debtors' objection to the pre-petition  
11 claims of the Michigan Department of Treasury. It pertains to  
12 proof of claim 16633 in which, among other things, the treasury  
13 asserted a claim for unpaid pre-petition tax liability for 2005  
14 under its subsequently repealed single business tax or SBT.

15 The parties have agreed upon the amount at issue as  
16 previously set forth on the record. Their dispute centers on  
17 two issues. The facts are otherwise stipulated. During the  
18 2005 tax year the debtors made over approximately billion-six  
19 in expenditures that constituted research and experimental  
20 expenditures, or R&E, under Internal Revenue Code Section 174.  
21 On their federal taxable return for 2005 they elected to  
22 capitalize over a billion dollars of these R&E expenditures and  
23 amortize them over ten years, which therefore permitted them to  
24 deduct approximately a hundred million in each of those ten  
25 years.



1           The rationale for that is set forth in the  
2       declaration of Mr. Whitson, his first declaration, in support  
3       of the objection. In essence the debtors had other deductions  
4       that they could take using foreign tax credits that made the  
5       ten-year amortization of the R&E expenditures most tax  
6       efficient for them on their federal return.

7           This is relevant because under the SBT Act a  
8       corporation begins computing its SBT liability with its  
9       "business income". Mich. Comp Laws, Section 208.9(1).  
10      Business income, then, is defined as "federal, taxable income",  
11      Michigan Comp Laws, Section 208.3(3).

12          The parties agree that the debtors' full deduction of  
13      their R&E would constitute an appropriate deduction for  
14      purposes of setting their federal taxable income for 2005.  
15      Where they disagree is that Delphi contends that that is all  
16      that is required, i.e., since that would fit into a proper view  
17      of federal taxable income for 2005 it can serve as a base under  
18      the SBT Act as business income.

19          The treasury, on the other hand, contends that the  
20      SBT Act requires the debtors to follow the same treatment for  
21      SBT business income purposes as they did on their 2005 federal  
22      return. The former method, the method adopted by Delphi, would  
23      lead to no SBT owing for 2005. The latter would lead to the  
24      amount as agreed upon -- the dollar amount as agreed upon, of  
25      liability, as stated at the beginning of this hearing.

1 Delphi supports its argument, in addition to pointing  
2 to the simple definition of business income found in Mich. Comp  
3 Laws, Section 208.3(3) by also pointing to the same statute at  
4 Section 208.5(3) which states that federal taxable income means  
5 taxable income as defined in Section 63 of the Internal Revenue  
6 Code and then further provides, in Section 4, Internal Revenue  
7 Code means the United States Internal Revenue Code of 1986 in  
8 effect on January 1, 1999 or at the option of the taxpayer in  
9 effect for the tax year for which the return is filed.

10 Delphi contends that this additional section reflects  
11 that not only does the definition of business income refer only  
12 to federal taxable income and not to the federal return but  
13 also the definition of the code gives the option of using one  
14 of two different years for purposes of calculating the amount  
15 of income.

16 The treasury points to two other sections of the  
17 Michigan Comp Laws, which it contends makes it clear that the  
18 focus must be on using the same return as opposed to federal  
19 taxable income generally. Mich. Comp Laws, Section 208.75  
20 states "A taxpayer required to file a return under this act,"  
21 i.e. the SBT, "may be required to furnish a true and correct  
22 copy of any return, or portion of any return, which he has  
23 filed under the provisions of the Internal Revenue Code."

24 And then two, "A taxpayer shall file an amended  
25 return with the department showing any alteration in or

1 modification of his federal income tax return which affects his  
2 tax base under this act. The amended return shall be filed  
3 within 120 days after the final determination by the Internal  
4 Revenue Service."

5 The court here, obviously, is applying Michigan law  
6 since this is a Michigan tax. And under Michigan law, the  
7 primary goal of judicial interpretation of statutes is to  
8 ascertain and give effect to the legislature's intent. The  
9 first criterion in determining intent is the specific language  
10 of the statute. The legislature is presumed to have intended  
11 the meaning plainly expressed. If the plain and ordinary  
12 meaning of the language is clear, judicial construction is  
13 normally neither necessary nor permitted, *Guardian Photo, Inc.*  
14 *v. Department of the Treasury*, 621 N.W.2d 233, 237 (Mich. Ct.  
15 App. 2001).

16 If, however, a statute is susceptible to more than  
17 one interpretation, judicial construction is proper due to term  
18 and legislative intent, *Twentieth Century Fox Home*  
19 *Entertainment, Inc. v. Department of Treasury*, 716 N.W.2d 591,  
20 601 (Mich. Ct. of App. 2006).

21 In respect of construing ambiguous statutes,  
22 statutory language should be construed reasonably keeping in  
23 mind the purpose of the act, *id.* And secondly, where, as is  
24 the case here, the agency responsible for administering an act  
25 has taken a position on how the act should be construed, it is

1 entitled, or its position is entitled, to "respectful"  
2 consideration where the statute may be viewed as ambiguous.  
3 And it ought not to be overruled without cogent reasons,  
4 Oakland Schools Board of Education v. Superintendent of Public  
5 Instruction, 757 N.W. 2d 73 at 75 (1977).

6           However, that degree of respect is far less than the  
7 the deference that would be given to a promulgated rule in  
8 conformity with the act, which the Department of the Treasury  
9 is authorized to do under Section 208.80(3) of the act. It's  
10 acknowledged here that the treasury's interpretation is not the  
11 subject of a properly promulgated rule and accordingly it does  
12 not carry the force of a properly promulgated rule, see A.Z.  
13 Shmina, S-H-M-I-N-A, & Sons Co. v. Department of Treasury, 512  
14 N.W.2d 57, 59 (Mich. Ct. App. 1993) and AC Plastics, Inc. v.  
15 Department of Treasury, 2006 W.L. 208, 5040, 3 (Mich. Ct. App.  
16 July 27, 2006).

17           Moreover, as described in the Open Schools case, the  
18 respect one should give to an agency's construction of the  
19 statute for which it's supposed to administer is bolstered by  
20 the fact that while it is not only a possible interpretation  
21 and not unreasonable, it is also one that is consistent with  
22 prior practice. See also Oakland Schools Board of Education v.  
23 Superintendent of Public Instruction, 257 N.W.2d 75.

24           The record here shows that the treasury's position  
25 with regard to its contention that the federal forms use or

1 application of income needs to apply or be applied on the SBT  
2 is in addition to the statements in the briefs saying that this  
3 is the treasury's position bolstered only by an instruction in  
4 the SBT form which instructs the taxpayer to use the income  
5 number as derived from the federal form. I note that that  
6 instruction itself is not consistent with the statute itself  
7 which gives the taxpayer the election to use either the current  
8 form or the form as in effect in 1999 or the calculation that  
9 would be applicable as to the IRC in effect in 1999.

10 Moreover, based on this record, the instruction is  
11 not consistent with prior practice as set forth in paragraph 9  
12 of Mr. Whitson's affidavit. In the past, the treasury has not  
13 audited and accordingly accepted an SBT form that used albeit a  
14 correct interpretation of federal income, a different  
15 calculation than what was set forth on the federal form.

16 Moreover, counsel for the treasury has acknowledged  
17 at oral argument that Michigan has done this in the past, in  
18 other instances, and that that is what has lead to the so-  
19 called addbacks issue that is the second issue in connection  
20 with this claim objection.

21 In light of all of the foregoing, I conclude that the  
22 claim, as asserted by the treasury, is not consistent with the  
23 clear language of the statute and in some respects contrary to  
24 the language of the statute. The statute does not refer, in  
25 its definitions, to a requirement that the same return be used

1 for the SBT as was used for the federal form. Instead, the  
2 statute refers simply to the definition of federal taxable  
3 income and it is agreed by both parties that this is an  
4 acceptable position that Delphi is taking in respect of its  
5 federal taxable income. Moreover, the statute itself permits  
6 variations from the current year's form.

7 And finally, I don't believe that the requirement  
8 that the taxpayer provide a copy of its federal return goes as  
9 far as the treasury would want it to go but can easily be read  
10 as simply providing for provision of the returns so that the  
11 treasury can verify the position taken by the taxpayer in the  
12 federal return and then follow up with regard to any further  
13 adjustments or modifications for consistency's sake.

14 The position, then, of the treasury should not be  
15 adopted here, see A.Z. Shmina & Sons Co. v. Department of  
16 Treasury, 512 N.W.2d 59.

17 The second issue raised by the proof of claim is the  
18 treasury's contention that in light of the repeal of the SBT,  
19 which has occurred since the date of the tax, the addbacks to  
20 reflect subsequent federal deductions based on depreciation  
21 should be accelerated. Delphi does not dispute that it is  
22 appropriate to add back a portion of the deduction, that is the  
23 portion that would be in for that year, so that in effect it  
24 would not be getting an extra deduction for that amount, having  
25 taken it all in a prior year based on the 2005 SBT.

1           What Delphi objects to, however, is acceleration of  
2     the addbacks to the amount. The purpose of the parties having  
3     engaged in such addbacks in the past makes perfect sense, it's  
4     to avoid the taxpayer having a windfall in that it would have  
5     already received the benefit of the deduction under the SBT and  
6     therefore shouldn't be able to charge an inconsistent deduction  
7     subsequently taken based on the amortization under the position  
8     it took on its federal return.

9           However, I don't see a basis for a windfall argument  
10    beyond that, i.e. the statute has been repealed and so by  
11    definition for the subsequent years after the repeal Delphi  
12    wouldn't be having a windfall because there would be no tax  
13    covered at that point, no tax subject to the SBT. It may be  
14    that under other statutes the logic of not having a double  
15    deduction would apply, but that's not what is covered by this  
16    proof of claim. And it has been asserted to me, and I accept,  
17    that there is no true successor to the SBT.

18           So without prejudice to the treasury's right to avoid  
19    true double deductions or a true windfall to Delphi in respect  
20    of some other tax in the future, I conclude that the  
21    accelerated addback element of this proof of claim is not  
22    justified and therefore that that portion of the proof of claim  
23    also should be disallowed.

24           So based on the foregoing, I'll grant the debtor's  
25    objection to the claim and you should submit an order to that

1 effect to chambers. You don't need to settle it, but you  
2 should send it to counsel for a day or so, so she can verify  
3 that it's consistent with my ruling and then provide it to  
4 chambers.

5 MR. RAMLO: Yes, Your Honor. We will do that.

6 THE COURT: Okay. Thank you.

7 MR. RAMLO: Thank you, Your Honor.

8 THE COURT: And that concludes the matters before me  
9 on Delphi? There are no further Delphi matters on?

10 MR. FLORES: Your Honor, we had --

11 THE COURT: Yes, we have the -- all right. This is  
12 the discovery issue?

13 MR. FLORES: That's right.

14 THE COURT: Has there been any further resolution of  
15 this matter? This is Delphi vs RCS Computer.

16 MR. LAZARUS: Harlan Lazarus for the debtor -- excuse  
17 me, Your Honor, for the defendant. Mr. Flores and I have, in  
18 the past week, had multiple discussions about the settlement of  
19 the entire claim. I have supplied some documents. There's a  
20 40,000 dollar issue as to how much is owed. The principal  
21 issue is the defendant's ability to pay any amount and over  
22 what period of time. And that is where we have focused in the  
23 last week. I have made, as recently as late yesterday, a  
24 further proposal responding to reaction from the debtor and I  
25 am waiting to hear, at this point, from Mr. Flores, who I



1 understand is waiting to hear from his client.

2 MR. FLORES: Your Honor, this is Steven Flores from  
3 Togut, Segal & Segal. We are conflicts counsel to Delphi. And  
4 I basically agree with Mr. Lazarus. There is a pending offer,  
5 but I would only add that based on my understanding of where  
6 things are there's still a lot of distance between the parties.  
7 So we feel this conference is necessary.

8 The defendant has produced about three dozen pages of  
9 documents since we wrote the letter to the Court. Before we  
10 wrote the letter to the Court --

11 THE COURT: We don't need to get into that.

12 MR. FLORES: So we have received about three dozen  
13 pages of documents from the defendants. We believe that that  
14 production does not satisfy the outstanding discovery  
15 obligations. And while we are happy to continue settlement  
16 discussions, we do believe that a dual track approach is  
17 appropriate here because we think Court ordered discovery will  
18 go a long way towards keeping the defendant focused on  
19 resolving this action.

20 THE COURT: All right. Well, I take it that you've  
21 never extended the discovery deadline as a condition to the  
22 settlement discussions?

23 MR. FLORES: There has been no extension, that's  
24 correct.

25 THE COURT: Okay. Well, is it true that there's only

1 40,000 dollars at issue here or is that the difference between  
2 you all? I don't understand.

3 MR. LAZARUS: I apologize, Your Honor. That's the  
4 difference. The books and records of my client reflect a  
5 balance of approximately 211.

6 THE COURT: All right. You should comply with the  
7 discovery request, in full, twenty-one days from today.  
8 That'll give the debtors time to assess the settlement and you  
9 time to assemble the documents, and that's the discovery  
10 cutoff. Any questions?

11 MR. LAZARUS: No, Your Honor.

12 THE COURT: Okay.

13 MR. FLORES: No, Your Honor, thank you.

14 THE COURT: Okay.

15 MR. RAMLO: Your Honor, that concludes the Delphi  
16 calendar. May we have the Delphi related personnel excused  
17 from the courtroom?

18 THE COURT: Certainly.

19 MR. RAMLO: And may I present the stipulations with  
20 respect to the claims?

21 THE COURT: Yes, you can hand those up.

22 MR. RAMLO: Thank you, Your Honor.

23 THE COURT: Okay.

24 (Proceedings Concluded at 11:33 AM)  
25

I N D E X

E X H I B I T S

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C E R T I F I C A T I O N

I, Pnina Eilberg, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

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Pnina Eilberg

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Date: August 6, 2008